IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1740

HENRY SAMUEL ATKINS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

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No. .....

HENRY SAMUEL ATKINS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 22, 1976.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals affirming petitioner's conviction is reported at 528 F.2d 1352 and is set forth in the Appendix, infra, at pp. 1a-10a.*

The district court rendered no opinions. The order of the district court denying defendant's motion for a judgment of acquittal is unreported and is set forth in the Appendix, infra, at p. 11a.

JURISDICTION

The opinion of the Court of Appeals affirming petitioner's conviction was entered on March 22, 1976. A timely field petition for rehearing with a suggestion for rehearing en banc was denied April 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the decisions of this Court in Joseph v. United States, 405 U.S. 1006 (1972) and Lenhard v. United States, 405 U.S. 1013 (1972), which require the reversal of a conviction for a violation of the Selective Service

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*All references "a" refer to the appendix to this petition.

Act where Selective Service local and appeal boards fail to state reasons for the denial of a prima facie claim for deferment, apply to non-conscientous objector deferment cases?

2. Whether this Court's decision in McKart v. United States, 395 U.S. 185 (1969), precludes the application of the Joseph-Lenhard doctrine to Selective Service offenses other than failure to submit to induction?

3. Whether this Court's decision in McKart v. United States, 395 U.S. 185 (1969) precludes the application of the due process principles of Gonzalez v. United States, 348 U.S. 407 (1955), to Selective Service offenses other than failure to submit to induction?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, the Military Selective Service Act of 1967 (50 U.S.C.App. §451, et. seq.), Title 32 of the Code of Federal Regulations, Part 1600, et. seq.; and a Selective Service System Letter To All State Directors set forth in the Appendix, infra at 12a.

STATEMENT OF THE CASE

Petitioner Henry Samuel Atkins, Jr., a practicing attorney, was convicted for an alleged violation of 50 U.S.C.App. §462(a)

in that on or about April 16, 1970, he willfully and knowingly failed to report for and submit to an Armed Forces physical examination as required by 32 C.F.R. §1628.16(c)(3)(1970)(2a).

At age 18, Atkins duly registered with Local Board No. 125, Augusta, Georgia. From September 1962 to June 1966 he was deferred as an undergraduate student pursuing a full time course of college study. In September, 1966, he entered the University of Georgia Law School as a full time law student and was deferred as a graduate student. Upon his graduation from law school he was reclassified to I-A as available for service (2a).

Since June 30, 1967, petitioner has not been deferred as an undergraduate student pursuant to 50 U.S.C.App. §456(h)(1)(1967).

During the month of July, 1969, petitioner applied to his local board for both a III-A statutorily mandated fatherhood deferment and a discretionary III-A deferment based upon extreme hardship. See 32 C.F.R. §1622.30(b)(1970). On July 19, 1969, petitioner filed with his local board documentation indicating that his wife was pregnant with her second child and giving her estimated date of delivery. Petitioner also stated that his "wife, child, and child to be born in October are solely dependent upon me." On July 24, 1969, the local board reopened his classification (see 32 C.F.R. Part 1625 (1970) denied him both forms of III-A deferments and classified him I-A. On July 29, 1969 petitioner filed a letter with his local

board reiterating that he was claiming a III-A hardship deferment. On July 30, 1969, petitioner wrote his local board and requested a personal appearance pursuant to 32 C.F.R. Part 1624 (1970). He also gave further explanation of his family's hardship in a separate covering letter and enclosed a lengthy and detailed affidavit setting forth the bases of his claim for a hardship deferment (2a-3a). The affidavit specified that petitioner had incurred substantial financial indebtedness to his mother to pay for his education.

> "I agreed with my mother that I would borrow her savings to put me through school and that then, when I finished, I would repay her this money as rapidly as I could so that it could be used again for my younger brother's education and that he would repay it as soon as possible so that it could be used again for our younger sister's education. Thus, my ability to repay the $8,100.00 I owe my mother is the only real assurance that my younger brother and sister will be able to get a college education. In addition to this debt to my mother, I have had to borrow $300.00 from the First National Bank and Trust Company of Augusta.

...I feel that my brother and sister, who are dependent upon my ability to repay for their education, will be placed under an extreme hardship in this regard.

I am married and have one son ten months of age and my wife is expecting another child in October, 1969....My wife has never worked and has no skill by which she could obtain gainful employment that would pay her sufficiently after the birth of our next child to employ someone to look after the children during her working hours. She cannot depend on either of my parents or either of her parents to help her either physically or finanically because all of them work and are not possesșed of sufficient financial means to render her financial assistance.

My wife is under the care of Dr. Watson in Augusta and with our first child, she had complications which almost resulted in a breach birth, which also resulted in some after birth complications. Dr. Watson was her attending physician at that time and under these conditions we feel it important that she should continue under his care.

I have never worked where group hospitalization insurance was available and I have no hospitalization or medical insurance of any kind." (Cir.App. 141-143)*

Petitioner also submitted two sworn statements to his local board. One, from the parents of his wife specified that "We...cannot in any way contribute to the support of Henry's family. We have other obligations." (Cir.App.145) The second sworn letter from petitioner's parents stated that Atkins was "...the sole support of himself, his wife Michelle, his son Ravanel, and for the Baby [sic] due to arrive....We...cannot in any way contribute to the support of Henry's family. We have two other children at home to educate." (Cir.App.146)

On August 4, 1969, petitioner's local board mailed him a selective service "Dependency Questionnaire." The board directed that petitioner "must complete and return the form...with three other letters from people having knowledge of your family circumstances. These people must be disconcerned persons." Petitioner returned the Dependency Questionnaire to his local board and appended thereto four letters from persons attesting to the veracity of his hardship claim.(Cir.App. 148-155)

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*All references "Cir.App." refer to petitioner's appendix in the Court below.

Thereafter, on October 9, 1969, petitioner personally appeared before his local board. Following the personal appearance, the board denied petitioner's claim for a hardship deferment. Unbeknowst to petitioner it specified as the basis for its decision that:

> "The registrant has very well fixed families both he and his wife the wife and children will not suffer a hardship [sic].
>
> Board members have personal knowledge of the family circumstances and feel that since both families are well able to support family. Hardship deferment denied [sic]."(3a)

The board did not specify the basis for its "personal knowledge" of the petitioner's "family circumstances," contra 32 C.F.R. §1623.1(b), nor did it forward a copy of its decision to petitioner. Neither did it specify the "knowledge" it had obtained which it thought sufficient to justify rejecting the sworn statements of the petitioner's parents and his parents-in-law.

On October 17, 1969, petitioner filed a timely notice of appeal to the Appeal Board pursuant to 32 C.F.R. §1626.11(a)(1970). Petitioner's selective service file reveals that up to this time the local board had neither reduced to writing the basis for the "personal knowledge" which it claimed to have

had of petitioner's family circumstances, nor had it notified petitioner that it had placed its summary of October 9, 1969 in his file.

The record of this case unequivocally shows that petitioner was never made aware of the existence of the contents of, or the sources for, the information contained in the board's summary of October 9, 1969.[1/]

On November 12, 1969, petitioner's file was forwarded to the appeal board. In accordance with a Georgia State Selective Service Form #M, the board was required to affirm that "all testimony and evidence on which the local board's classification is based [be] reduced to writing and placed in the registrant's file." The Executive Secretary of the local board made the conclusory response, "See letters in file dated 10/9/69", thus referring the appeal board only to the local board's memoranda of petitioner's appearance before the local board. (Cir.App. 164)

On February 6, 1970, the Appeal Board, without stated reason, denied petitioner's appeal. The local board then notified petitioner that he had again been classified I-A. (3a)

1/ The government's only witness at trial, the local board clerk, admitted that she did not know what the board member's personal knowledge was or whether it was accurate. (Cir.App.66)

On February 25, 1970, petitioner was ordered for a pre-induction physical examination, with a reporting date of March 5, 1970. On April 8, 1970, petitioner, not having appeared for the March 5th physical examination, was reordered for a physical examination for April 16, 1970. Petitioner concededly did not report for the physical examination and his indictment followed on September 18, 1972.[2] (3a-4a)

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[2] In March, 1971, petitioner commenced a civil action, Atkins v. Tarr, No. 1636, in the United States District Court for the Southern District of Georgia, seeking a declaratory judgment and a writ in the nature of mandamus, seeking to compel Local Board No. 125 to classify him III-A by reason of fatherhood on the ground that the Local Board's application of 32 C.F.R. §1622.30(a)(1969), in such manner as to automatically prohibit the granting of III-A fatherhood deferments to registrants who had received only graduate school deferments after September 1, 1967, pursuant to 50 U.S.C.App. §456 (h)(2)(1967), was plainly unlawful. See Plotner v. Resor, 3 SSLR 3342, appeal dismissed as moot, 463 F.2d 422 (5th Cir. 1972). Petitioner contended that the regulation, to be consistent with the Act, could only prohibit the receipt of mandatory III-A fatherhood deferments to

PROCEEDINGS BELOW

The government's only witness at trial was Mrs. Ollie S. Rockett, clerk of petitioner's local board. Petitioner's entire selective service file was introduced into evidence.

The evidence showed that had a III-A deferment been granted to petitioner at the point during the board's processing of his case when such a deferment should have been granted, petitioner could not, as a matter of both fact and law, have been issued the physical examination order upon which his indictment was based.

2/contd.

registrants who had received undergraduate II-S deferments since June 30, 1967 pursuant to 50 U.S.C.App. §456(h)(1), a different statutory section. Atkins' undergraduate deferments had all been granted prior to 1967 under the 1951 Selective Service Act. This claim is to be distinguished from Atkins' additional claim to entitlement of a III-A hardship deferment pursuant to 32 C.F.R. §1622.30 (b)(1969).

The civil suit was held in abeyance pending resolution of the Sixth Circuit's decision in Gregory v. Hershey, 311 F.Supp. 1 (E.D.Mich. 1969), rev'd 436 F.2d 513

The clerk also admitted that there was no way to ascertain the accuracy of the unspecified "personal knowledge" which the board relied upon in denying petitioner's request for a hardship deferment.

The trial lasted almost two days.

After approximately one and one-half hours of deliberations, the jurors announced that they were deadlocked. The court, over the objection of defense counsel (Cir.App. 123), then gave an "Allen charge". Thereafter the jury found the petitioner guilty.

Petitioner was sentenced to a period of ninety days confinement in the custody of the Attorney-General.

REASONS FOR GRANTING THE WRIT

Throughout the course of this litigation, two factors have been largely undisputed. First, petitioner was the object of an egregious violation of administrative due process perpetrated by the Selective Service System. Second, had petitioner attended the physical examination in question and passed (as the

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2/contd.
(6th Cir. 1971), cert. denied sub. nom. Gregory v. Tarr, 403 U.S. 922 (1971). On September 18, 1972, prior to resolution of his civil action, petitioner was indicted. Thereafter, on May 18, 1973, the civil action was dismissed on jurisdictional grounds in a memorandum opinion. (Cir.App. 172-177)

record clearly reflects he would have) and had he then refused to submit to induction after being ordered to do so, it is clear that a successful prosecution for refusing induction could not have been maintained because of the violation of due process which would underlie the induction order.

Petitioner exhausted every conceivable avenue of administrative and civil judicial relief available to him relevant to his application for deferment. He has, however, been deprived in the final and only forum available, review of the merits of his due process claims only because he engaged in the jurisdictionally necessary act of non-compliance with an order one administrative step too early according to the court below.

No claim has ever been asserted by the government that it was deprived of the opportunity to give consideration to petitioner's administrative claims for deferment. To the contrary, it is the blatant violations of due process committed by the Selective Service System during its own fact finding process which petitioner asserts should bar his prosecution.

The decision below represents an unwarranted expansion of the "exhaustion doctrine" in Selective Service cases and directly conflicts with the expansion of due process protections afforded to Selective Service registrants by prior decisions of this Court.

The decision below, if permitted to stand, will substantially impair the rights of defendants in the approximately four thousand[3/] Selective Service prosecutions still pending the various district courts of the nation.

I

THE DECISION BELOW ERRONEOUSLY DEPRIVED PETITIONER OF THE PROTECTION OF THIS COURT'S DECISIONS IN JOSEPH v. UNITED STATES, 405 U.S. 1006 (1972), LENHARD v. UNITED STATES, 405 U.S. 1013 (1972) AND GONZALEZ v. UNITED STATES, 348 U.S. 407 (1955).

A. Circumvention of the Joseph-Lenhard Rule

Any uncertainty as to whether a local or appeal board's failure to articulate its reasons for the denial of a claim for deferment constitutes a defense to a later charge of refusing to submit to induction was eliminated by this Court's decisions in Joseph v. United States, 405 U.S. 1006 (1972) and Lenhard v. United States, 405 U.S. 1013

3/ House Report on the Presidential Clemency Program, Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Judiciary Committee, 94th Cong., 1st Session (Committee Print, August, 1975) p.4.

(1972). See also, United States v. Stewart, 478 F.2d 106 (2nd Cir. 1973). These decisions confirmed as law what the Solicitor General conceded in his memorandum replying to Lenhard's petition for certiorari:

> "Our difficulty is...at the administrative review level; we agree with the dissent below that the belated revelation at the hearing following the trial of the local board's reasons does little to make the earlier review of the claim by the State Appeal Board any more meaningful. While that review is de novo, the Selective Service regulations provide that the one taking an administrative appeal shall have an opportunity to submit a written statement to the State Appeal Board setting forth in what manner he believes the local board erred (32 C.F.R. 1626.12). As this Court recognized many years ago in Gonzalez v. United States, supra, 348 U.S. at 415, 75 S.Ct. 409, 'the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all awareness of the recommendations and arguments to be countered.' This, we

> think, requires, at the very least, knowledge of the grounds for the local board's decision. See, e.g., United States v. Broyles, supra, 423 F.2d at 1305-1306; United States v. Washington, supra, 392 F.2d at 39."

As quoted in Stewart, supra at 478 F.2d 112.

The Joseph-Lenhard rule has been applied to III-A (hardship) deferment cases. See, e.g., United States ex rel. Bent v. Laird, 453 F.2d 625 (3rd Cir. 1971) and II-A (occupational deferment cases). Eleey v. Volatile, 478 F.2d 333 (3rd Cir. 1973) (en banc).

The court below circumvented the applicability of Joseph and Lenhard by reliance upon the dictum of Justice Marshall in McKart v. United States, 395 U.S. 185, 203 (1969), to the effect that an invalid classification "would not be a defense today to a prosecution for

failure to report for a pre-induction examination." But this dictum has been continually distinguished on the peculiar facts of McKart's case.

In McKart, the sequence of timing between the misclassification and the order to report for the physical examination was irrelevant since the board acted on the command of the National and State Directors of Selective Service who erroneously interpreted a statutory provision rather than a disregard of clear deferment standards. United States v. Brandt, 435 F.2d 334, 326 n.2 (9th Cir. 1970); United States v. Hayden, 445 F.2d 1365, 1369-1370 (9th Cir. 1971).

By contrast, at trial here, the witness Rockett admitted that as a matter of fact and law, had petitioner been in classification III-A on or about April 8, 1970, (the date upon which the physical examination order was issued) petitioner could not have been issued the order for the physical examination:

> "Q. Okay. Isn't it a fair statement of the regulations, however, that if he was 3A at the time that the first order of induction [sic][for a physical examination] went out, he would not have been able to have been ordered for a pre-induction physical?

"A. Not unless his 3A was expiring.

"Q. Okay. Is it fair to say, Maam, that a 3A which would have shortly been given umm--before that for either Fathership--Fatherhood or extreme hardship would not have been expiring at that date?

"A. If granted. No.

"Q. And, in fact, Maam, when you say shortly would be expiring, wasn't there a un-- state directive, or a directive which--It was a National directive, I'm sorry-- which stated that you couldn't order him for induction if he was not lAo, lA, or lo-- unless his deferment would expire within six months? Is that right?

"A. Right." (Cir.App. 75-76)

The directive to which the witness referred is a Letter To All State Directors dated March 5, 1970, which specified in pertinent part that only registrants in deferred classifications "who are likely to be removed from their current deferred or exempted status in the next six months" (12a)

could be called for physical examinations. This directive is consistent with the scheme for ordering registrants for physical examinations as set forth in 32 C.F.R.§1628.11(b) and (c) (1970). Registrants who were classified in Class I-A were to be called for physicals pursuant to §1628.11(b) without regard to the pendency of a personal appearance or an appeal. However, if a registrant had obtained a deferment, he could only be called under a separate subsection of the regulation, subsection (c), which would permit his examination if and only "if [the local board] determines that his induction may shortly occur," United States v. Gutierrez, 485 F.2d 1378, 1380 (9th Cir. 1971). The letter quoted above is consistent with the provisions of subsection (c). Finally, a board could call a registrant for a physical examination "whenever directed to do so by the Director of Selctive Service or the State Director of Selective Service" §1628.11(c). Since petitioner was in class I-A at the time he was called, he was ordered pursuant to subsection (b) of §1628.11.

Had petitioner been classified III-A (either for hardship reasons or for fatherhood), under both the regulations and the Letter To All State Directors, he could have been ordered for the physical "only if [the local board] determine[d] that his induction may shortly occur" ("shortly", under the letter, was interpreted as six months). The sequence of administrative proceedings in

petitioner's case[4/] revealed and the government never seriously maintained otherwise, that had petitioner been classified III-A, as he should have been on April 6, 1970, he could not have been called for the physical examination which underlies his conviction.

The court below in affirming petitioner's conviction totally misapprehended the effect of the due process violations which occurred

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4/ The local board rejected petitioner's request for a III-A deferment on October 9, 1969. The appeal board rejected it on February 6, 1970. Petitioner was ordered for the physical in question in April, 1970. The nature of petitioner's claims for deferment clearly were not temporary. Had he been granted a III-A deferment, there would have been no basis for the local board to reclassify him back to I-A within two months of a favorable appeal board decision. Simply stated, had either the local or appeal board granted the petitioner a III-A deferment, he could not have been ordered for a physical examination at the time that he was since he would not have been a I-A registrant or a registrant in a classification other than I-A whose induction the board had determined might shortly occur.

in the processing of petitioner towards his physical examination and upon whose existence petitioner had urged reversal of his conviction.

The opinion below circumvents the Joseph-Lenhard doctrine by concededly elevating the "dictum in McKart [v. United States, 395 U.S. 185 (1969)]...that an improper classification is not a defense to a prosecution for failure to report for a physical examination," United States v. Atkins, 528 F.2d 1352, 1357 (5th Cir. 1975) (6a-7a), to a firm holding, thus proceeding to bar petitioner's major defense.

Applying the "exhaustion doctrine" in the following manner, the panel reasoned that,

> "there remains the distinct possibility that he will fail the physical and mental examinations and be placed in a lower classification, thereby eliminating any problems resulting from the improper classification. This winnowing of unfit registrants concomitantly reduces the number of criminal cases that courts must review. Furthermore, local boards are entitled to information as to the physical condition of registrants

> in performance of their duty to keep informed of the status of classified registrants. See 32 C.F.R.§1625.1 (c); United States v. Kohls, 9 Cir. 1971, 441 F.2d 1076, 1079, cert. denied, 404 U.S. 844, 92 S.Ct. 142, 30 L.Ed.2d 79."

United States v. Atkins, supra, at 1357(6a).

What this analysis completely fails to deal with is petitioner's undisputed showing that had either the local or appeal board classified petitioner properly the granting of a deferment would have prevented issuance of the physical order in the first instance thus rendering superfluous the System's "winnowing process" referred to by the court below. Furthermore, not once in his entire Selective Service history had petitioner claimed any medical defect. And, even if petitioner had by some fluke failed to pass an examination, thus becoming eligible for classification 1-Y, see 32 C.F.R.§1622.17 (1970), he nevertheless would have to have been classified III-A if eligible, the latter being a lower classification. 32 C.F.R. §1623.2(1970) ("...the registrant shall be classified in the lowest class for which he is determined to be eligible..."). Cf. United States v. Bornemann, 424 F.2d 1343, 1347 (2d Cir. 1970).

> "The exhaustion doctrine must, at the very least, stand for

> the proposition that only where the omitted administrative remedies would have served some useful purpose will the defendant's failure to exhaust those remedies preclude him from obtaining judicial review of the Selective Service System's determination. See McGee v. United States, supra; and McKart v. United States, supra. Therefore, since by the very definition of the defense asserted by the defendant in the instant case the omitted administrative remedies would have served no useful purpose, the defendant's failure to exhaust those remedies should not preclude him from raising that defense in the instant prosecution."

United States v. Godfrey, 346 F.Supp. 671 (D.Minn. 1972).

Similarly, in United States v. Jensen, _F.Supp._, Cr. No. 9336 (D.N.D., Dec. 26, 1974), Chief Judge Benson rejected the analysis of McKart followed by the court below.

> "It is the government's claim that failure to respond [to the order] constitutes a failure to exhaust administrative remedies, which in turn,

precludes him from asserting the claimed procedural defenses.... The government's claim is based on a speculation that because the defendant had earlier claimed a physical defect he may have been rejected in some aspect of the final induction process. However, the cover sheet does not reveal that grounds for a medical deferment had been established, nor were they pleaded by the defendant. In that light alone, the exhaustion theory appears inapplicable."

United States v. Jensen, supra, at pp. 10-11,memorandum opinion.[5]

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[5] The expiration of the induction authority under the Selective Service Act and the concommitment suspension of physical examinations has eliminated the possibility that "similarly situated" registrants would purposely bypass physical examinations if they, like petitioner, were allowed to maintain their defenses. See, United States v. Riddle, 3 Military Law Reporter 2497 (D.N.J. 1975) distinguishing McKart, supra, on this ground.

B. Circumvention of the Gonzalez Rule

Following his personal appearance before the local board, petitioner's claim for a hard-ship deferment was denied. The local board, unbeknownst to the petitioner, placed in his file the summary which stated:

> "The registrant has very well fixed families both he and his wife the wife and children will not suffer a hardship [sic].
>
> ****
>
> Board members have personal knowledge of the family circumstances and feel that since both families are well able to support family. Hardship deferment denied [sic]."

The board did not specify the basis for its "personal knowledge" of the petitioner's "family...circumstances" nor did it forward a copy of its decision to petitioner. Neither did it specify the "knowledge" it had obtained which it thought sufficient to justify rejecting the sworn statements of petitioner's parents and parents-in-law previously sent to the board which directly contradicted the board's assertions.

At trial the clerk testified that she had been instructed by one of the board members to insert the memorandum into petitioner's file.

32 C.F.R. §1623.1(b)(1970) at all times relevant, provided in pertinent part:

> "Since it is imperative that appeal agencies have available to them all information on which the local board determined the registrant's classification, oral information shall not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances shall the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file." (emphasis added)

32 C.F.R. §1626.13(a)(1970) also provided:

> "If any information considered by the local board does not appear in the written information in the file, other than information presented orally by the registrant or in his behalf at a personal appearance under the provisions of §1624.2 of this chapter, the local board shall prepare and place in the file a written summary of such information." (emphasis added)

Petitioner's local board flagrantly violated these regulations and the standards of due process previously enunciated by this court by placing in the petitioner's file, without notifying him, negative information obtained by the board members through "personal knowledge" the sources and bases of which had not been reduced to writing as required by the regulations.

Had petitioner been informed of the sources of the local board's "personal knowledge" or that such a summary was being placed in his file, he could have responded to this adverse information by the time the file was sent to the appeal board. This in turn could have affected the appeal board's disposition of his claim for a hardship deferment.[6/] Under the then existent regulatory scheme for calling registrants for physical examinations, as discussed in Section A, supra, if the appeal board had classified Atkins III-A, on February 6, 1970, (See n.4, supra) he clearly would not have been ordered for a physical examination only two months later since the board could not possibly have determined "that his induction might shortly occur."

[6/] It can be assumed that the reasons given by the local board were relied upon by the appeal board. Clay v. United States, 403 U.S. 698, 704 (1971).

In Gonzalez v. United States, 348 U.S. 407 (1955), this Court recognized that the failure of the Selective Service System to supply a registrant with a copy of the Department of Justice's recommendation to his appeal board regarding his claim for a conscientious objector deferment, unconstitutionally deprived him of an opportunity to rebut any adverse evidence contained therein. Relying on its two prior decisions in Simmons v. United States, 348 U.S. 397 (1955) and United States v. Nugent, 346 U.S. 1 (1953), this court held that:

> "The right to file a statement [in rebuttal]...includes the right to file a meaningful statement...with awareness of the... arguments to be countered. 348 U.S. at 415"

The Gonzalez principle has been consistently and rigorously applied. In McGarva v. United States, 406 U.S. 953 (1972), this Court vacated a conviction upon the Solicitor General's recognition that "failure to inform [McGarva] of the existence of the government appeal agent's adverse report 'so that he could be afforded an opportunity to rebut' was a fatal error in the processing of petitioner's claim." United States v. McGarva, 464 F.2d 1389 (5th Cir. 1972).

In United States v. Taylor, 490 F.2d 442 (1974), the Fifth Circuit itself reversed a selective service conviction on facts almost four square with those on the petitioner's herein except for the nature of the underlying criminal charge. Taylor had applied for a III-A hardship deferment with his Atlanta, Georgia local board.

> "The Board did not advise Taylor that the...information which he had furnished in the dependency questionnaire had been supplemented with the Board's own unsupported supposition that his wife was now recovered from the disabling illness he had there described .... By even the most minimal standard of fairness, he was entitled to know the content of the record being transmitted in connection with his appeal [citing McGarva, supra]...."
> 490 F.2d at 446-447.

The expansion of the exhaustion doctrine created by the court below is unwarranted on the facts of this case.

The opinion below prevents the application of three prior opinions of this Court which should have mandated petitioner's acquittal. Certiorari should be granted to further delineate the breadth of the exhaustion doctrine.

CONCLUSION

For all the foregoing reasons, certiorari should be granted and the decision below reversed.

Respectfully submitted,

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APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Henry Samuel ATKINS, Jr.,
Defendant-Appellant.

No. 75-2754.

United States Court of Appeals,
Fifth Circuit.

March 22, 1976.

Defendant was convicted in the United States District Court for the Southern District of Georgia, Alexander A. Lawrence, Chief Judge, of willfully and knowingly failing to report for and submit to a preinduction physical and he appealed. The Court of Appeals, Coleman, Circuit Judge, held that the propriety of the defendant's draft classification was not a defense to a charge of failure to report for preinduction physical; that the trial court's denial of discovery of defendant's statement to the FBI was not an abuse of discretion; that the defendant was not denied his constitutional right to a speedy indictment and trial; that the trial court did not err in giving a modified "Allen charge"; and that the prosecutor's remarks during his summation to the jury were not prejudicially erroneous.

Affirmed.

1. Armed Services ⇐40.1(7)

Propriety of registrant's draft classification was not defense to charge of failure to report for preinduction physical. Military Selective Service Act, § 12, 50 U.S.C.A. App. § 462.

2. Armed Services ⇐20.8(3)

Issue of whether selective service board property classified registrant turns on whether there was any basis in fact for his classification.

3. Criminal Law ⇐627.8(2)

In prosecution for failing to report for preinduction physical, trial court did not abuse its discretion in denying motion to discover certain statements defendant made to FBI agent, in view of fact that discovery motion was made at pretrial conference immediately prior to impaneling jury approximately two years after arraignment, while rule of criminal procedure in effect at time of trial provided that motion must be made within ten days after arraignment, and Government never called FBI agent to testify and had informed defendant that they would advise him ahead of time if they decided to utilize agent's testimony. Fed.Rules Crim.Proc. rule 16(f), 18 U.S.C.A.

4. Criminal Law ⇐627.8(2)

Trial judge may deny untimely motion where defendant has failed to show cause why such motion would be in interest of justice. Fed.Rules Crim.Proc. rule 16(f), 18 U.S.C.A.

5. Criminal Law ⇐264

Where eight-month delay between indictment for failing to report for preinduction physical and arraignment was occasioned by Government's decision to postpone arraignment until conclusion of defendant's civil suit challenging his draft classification and defendant was arraigned within one month from decision in his civil action, delay in arraignment did not require dismissal under plan for prompt disposition of criminal cases within Southern District of Georgia, which required that arraignment occur within two weeks after indictment

unless circumstances made arraignment impractical. Fed.Rules Crim.Proc. rule 50(b), 18 U.S.C.A.

6. Criminal Law ⇐576(8)

Where two and one-half year preindictment delay was due to Government's desire to await outcome of litigation pending in Court of Appeals which concerned same issues and bulk of two and one-half year postindictment delay resulted from staying of defendant's criminal action pending resolution of civil action involving same issues, continuances and postponement of action to allow a defendant to enlist in armed forces as alternative to prosecution or to take advantage of presidential clemency program, and defendant never asserted his right to speedy trial until some eight months before trial, defendant was not denied his right to speedy trial, notwithstanding contention that delayed pendency of prosecution had effected defendant's practice as attorney and his personal life.

7. Criminal Law ⇐573

In determining whether defendant has been denied right to speedy trial, factors appropriate for consideration are: (1) length of delay, (2) reason for delay, (3) defendant's assertion of his right to speedy trial, and (4) prejudice resulting from delay in bringing defendant to trial.

8. Criminal Law ⇐863(1)

Giving modified Allen charge in prosecution for failure to report for preinduction physical was not erroneous, notwithstanding contention that charge was erroneous since jury had only been deliberating 90 minutes and they seemed more confused than conscientiously deadlocked.

9. Criminal Law ⇐1171.1(2)

In prosecution for failure to report for preinduction physical, prosecutor's remarks during summation to jury were not prejudicially erroneous.

Appeal from the United States District Court for the Southern District of Georgia.

Before WISDOM, COLEMAN and GEE, Circuit Judges.

COLEMAN, Circuit Judge.

Appellant Henry Samuel Atkins, Jr., a practicing attorney, appeals from his jury conviction for wilfully and knowingly failing to report for and submit to an Armed Forces physical examination in violation of 50 U.S.C. App. § 462. We affirm the judgment of the District Court.

From September, 1962 to June, 1966, Atkins was in undergraduate school and was classified by the Selective Service as II–S. After graduation from college, Atkins entered the University of Georgia Law School and was again classified II–S until he completed law school in the summer of 1969. On July 24, 1969, the appellant was reclassified I–A.[1] Four days later, Atkins wrote the local Selective Service board indicating that he felt he had been erroneously classified and that he deserved a III–A Hardship deferment based on the fact that he had a ten month old child and pregnant wife who would be placed in extreme hardship were he to be inducted into the armed forces. Thereafter, Atkins submitted affidavits and letters from friends and relatives attesting to his entitlement to a hardship classification and requested a personal appearance before the board.

1. I–A classification means that a registrant is available for military service. 32 C.F.R. § 1622.2.

On August 4, 1969, the board acknowledged receipt of appellant's letters and advised him that he would be considered for a hardship deferment. On August 11, 1969, Atkins was ordered to report for a preinduction physical examination, but the examination was postponed when Atkins informed the board that he had moved from Augusta and was now working and living in Thomaston, Georgia. On October 9 Atkins made a personal appearance before the local board in Augusta in reference to his claim for a III–A hardship deferment. Following the personal appearance, the board voted to deny the appellant's claim for a hardship deferment giving the following reasons:

> He claims extreme hardship. He has had a 2–S (not eligible for 3–A under Sec. 1622.30).
>
> He supported his wife while in college. He also has the Soldiers & Sailors Act for his indebtness [sic] of school expense.
>
> Wife & children can receive allotment.
>
> The registrant has very well fixed families both he and his wife. The wife and children will not suffer a hardship.
>
> Board members have personal knowledge of the family circumstances and feel that since both families are well able to support family [sic]. Hardship deferment denied.

Upon being informed of the board's action, appellant filed a notice of appeal on October 17, 1969.

The local board at Thomaston, Georgia, had rescheduled appellant's preinduction physical for October 21, 1969, but appellant failed to appear, stating that he had to return to Augusta for an emergency. Appellant's physical was rescheduled for December 1, 1969, but again he failed to appear. Atkins had informed the board on November 29 that he would not be able to appear for his physical examination on December 1 since he had to be in Tallahassee, Florida, that week to attend a mandatory course for new admittees to the bar.

On February 6, 1970, the Appeal Board denied Atkins' appeal and he was notified of this action a few days later. On February 18, 1970, Atkins requested that his classification be reopened due to a change in his status, namely the emotional depression and anxiety his wife had suffered since giving birth to their second child.

Atkins was ordered to report for a physical examination to be held on March 5, 1970, but once again failed to appear. The fifth and final order to report for a preinduction physical was issued to the appellant on April 8, 1970, with his reporting date set for the 16th of April. The appellant never appeared and his indictment for this failure eventually followed. Atkins wrote the local board on April 13 again requesting that his classification be reopened and also seeking assurances that he would not be inducted when he submitted to a physical examination. The board replied by letter on April 17 that a registrant is not inducted on an Order to Report for Physical Examination and informed appellant that his request for a change of classification had not warranted reclassification. Atkins was directed to go immediately to the nearest local board and request transfer for examination and

was admonished that failure to comply could lead to prosecutory action. Atkins wrote the board on April 20, 1970, requesting that any further action by the board be postponed until he had an opportunity to confer with his attorney. Atkins wrote the board again on April 30, again claiming entitlement to a III–A deferment and stating that he stood ready "to litigate this matter either as the plaintiff in a suit for an injunction or defendant in an action brought by the federal government". On September 18, 1972, the appellant was charged in a one count indictment for failing to report as ordered for an armed forces physical examination. Atkins had instituted a civil suit on March 15, 1971, seeking a declaratory judgment and a writ of mandamus to compel the local board to classify him III–A by reason of fatherhood.[2] The civil action was held in abeyance while cases with the identical issue were pending before the United States Supreme Court[3] and the Fifth Circuit Court of Appeals.[4] The civil action was dismissed on May 18, 1973, and no appeal was taken. The government had concluded that the criminal and civil suits were so interwoven that the criminal action should be stayed pending the disposition of the civil action, consequently the appellant was not arraigned until June 15, 1973. One week later, appellant was granted a 30 day continuance to attempt to enlist in some branch of the Service as an alternative to prosecution. Atkins' efforts to enter military service during the continuance allowed by the Court were without success. However, the United States Attorney delayed further action in order to allow Atkins to join some branch of the armed forces since he had expressed a desire to pursue that course. Intermittent reports of Atkins' efforts were received by the U. S. Attorney, but this came to nothing. Finally, the U. S. Attorney notified Atkins that unless entry into some branch of the armed forces was accomplished by June 15, 1974, his case would be set for trial. Trial was then set for September 30, 1974. On September 26, just prior to the scheduled trial, a hearing was held on motions by the appellant to dismiss the indictment on grounds of the denial of a speedy trial. The District Judge denied the motion to dismiss but then stated that he was going to construe it as a motion for a continuance to allow the appellant the opportunity to participate in the newly established "Presidential Clemency Program", if he so desired. Trial was finally had on May 15, 1975, and resulted in a jury verdict of guilty from which the instant appeal was taken.

As we construe the appellant's assignments of error, we are asked to decide five questions. First, is the defense of an improper classification of a registrant by a local selective service board allowable in a prosecution for failure to report for a physical? And if so, was the appellant improperly classified? Second, was the trial court's denial of discovery of defendant's statement to the FBI an abuse of discretion? Third, was the appellant denied his constitutional right to a speedy indictment and trial? Fourth, did the trial court err in giving a modified "Allen charge"? Lastly, did the prosecutor make prejudicial remarks during his summation to the jury?

2. Appellant points out that this is to be distinguished from his additional claim to a III–A hardship deferment.

3. The Sixth Circuit had decided the issue in question adversely to the position taken by Atkins, and the Supreme Court subsequently denied certiorari. *See Gregory v. Hershey*, 6 Cir. 1971, 436 F.2d 513, *cert. den. sub nom. Gregory v. Tarr*, 403 U.S. 922, 91 S.Ct. 2229, 29 L.Ed.2d 701.

4. *Plotner v. Resor*, 5 Cir. 1971, 446 F.2d 1066, appeal vacated as moot, 5 Cir. 1972, 463 F.2d 422.

Is the Propriety of a Registrant's Classification a Proper Defense to a Charge of Failure to Report for a Physical Examination?

[1] We are not here concerned with a failure to report for induction. Atkins was only charged with failing to report for and submit to a physical examination, and his conviction was for that offense only.

The appellant strongly urges that he was entitled to a III–A hardship classification and that the local board improperly classified him I–A. He argues that if a board commits a substantive or procedural error during the classification process at such time that, had the error not occurred, the registrant could not have been ordered for the physical, then such error operates as a defense to a charge of failing to report for a physical examination. This precise issue has never been decided by this Court.[5]

In *McKart v. United States*, 1969, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194, the Supreme Court held that a registrant's failure to appeal his I–A classification and his failure to report for a preinduction physical examination did not bar his challenge to the validity of his classification as a defense to a criminal prosecution for refusal to submit to *induction* into the military. The government had argued that failing to report for a physical, thus giving the System a final chance to reject someone, should bar a challenge to the validity of a classification. The Court found this argument unpersuasive in cases involving a prosecution for refusal to submit to *induction*, but then went on to state:

> [A] registrant is under a duty to comply with the order to report for a physical examination and may be criminally prosecuted for failure to comply. If the Government deems it important enough to the smooth functioning of the System to have unfit registrants weeded out at the earliest possible moment, it can enforce the duty to report for pre-induction examinations by criminal sanctions. In the present case, it has not chosen to do so. Petitioner has not been prosecuted for failure to report for his examination; he has been prosecuted for failure to report for induction . . . .
>
> 395 U.S. at 201, 89 S.Ct. at 1667, 23 L.Ed.2d at 208 (footnotes omitted).

But, as we have seen, the Selective Service System has ample means to ensure that the great majority of registrants will report for their pre-induction examinations. . . . An invalid classification . . . would not be a defense today to a prosecution for failure to report for a pre-induction examination.

Id. at 203, *Id.* at 1667, *Id.* at 208.

Since Justice Marshall penned this language (dictum) in *McKart*, four circuits have had occasion to consider whether

5. In *Moorman v. United States*, 5 Cir. 1968, 389 F.2d 27, 30–31, we held that intervening circumstances that placed the registrant in a different category within the same classification did not excuse his failure to report for a physical. In *Schutz v. United States*, 5 Cir. 1970, 422 F.2d 991, 994, we held that a registrant who claimed he had been called out of turn was still required to report for induction as ordered. We noted that wilful refusal to report for induction is a separate offense from that of refusing to be inducted after arrival at the induction center. *See also United States v. Taylor*, 5 Cir. 1974, 490 F.2d 442, 443 n. 1.

an invalid or improper classification is a proper defense to a charge of failure to report for a physical examination. The Second, Third and Eighth Circuits have consistently taken the position that improper classification is no defense to a charge of failure to report for a physical, *United States v. Rudd*, 2 Cir. 1973, 487 F.2d 367, 368; *United States v. Lawrence*, 2 Cir. 1973, 481 F.2d 1397; *United States v. Shriver*, 3 Cir. 1973, 473 F.2d 436; *United States v. Zmuda*, 3 Cir. 1970, 423 F.2d 757, *cert. den.*, 1970, 398 U.S. 960, 90 S.Ct. 2176, 26 L.Ed.2d 545; *United States v. Dombrouski*, 8 Cir. 1971, 445 F.2d 1289, 1296–97. The Sixth Circuit had declared prior to *McKart* that even if a registrant was improperly classified I–A, he was still under a duty to report for a physical examination, *United States v. Irons*, 6 Cir. 1966, 369 F.2d 557, 558. The Ninth Circuit's position is not as clear, although its most recent decisions indicate that it too adheres to the position that improper classification is no defense to failing to submit to a physical, *United States v. Weislow*, 9 Cir. 1973, 485 F.2d 560, *cert. den.*, 1974, 415 U.S. 933, 94 S.Ct. 1447, 39 L.Ed.2d 491; *United States v. Richardson*, 9 Cir. 1973, 484 F.2d 1046, *vac'd on other grounds*, 1974, 415 U.S. 971, 94 S.Ct. 1554, 39 L.Ed.2d 867; *United States v. Heinrich*, 9 Cir. 1972, 470 F.2d 238 (en banc), *cert. den.*, 1973, 411 U.S. 909, 93 S.Ct. 1535, 36 L.Ed.2d 200; *United States v. Heywood*, 9 Cir. 1972, 469 F.2d 602.[6] The Ninth Circuit in *United States v. Brandt*, 9 Cir. 1970, 435 F.2d 324, did allow a defense of improper classification when the Court found the board's order to report for examination to be *unlawful*. Brandt was classified II–S and was entitled to that classification as a matter of law when the board, for no legitimate reason, reclassified him I–A. The Court found that the board acted in excess of its authority and reversed Brandt's conviction.

The reasoning given for not allowing improper classification as a defense to failing to submit to a physical is that the smooth functioning of the Selective Service System demands that unfit registrants be weeded out as early as possible. Even if a registrant is improperly classified I–A, there remains the distinct possibility that he will fail the physical and mental examinations and be placed in a lower classification, thereby eliminating any problems resulting from the improper classification. This winnowing of unfit registrants concomitantly reduces the number of criminal cases that courts must review. Furthermore, local boards are entitled to information as to the physical condition of registrants in performance of their duty to keep informed of the status of classified registrants. *See* 32 C.F.R. § 1625.1(c); *United States v. Kohls*, 9 Cir. 1971, 441 F.2d 1076, 1079, *cert. denied*, 404 U.S. 844, 92 S.Ct. 142, 30 L.Ed.2d 79.

[2] We see no sound reason for disagreeing with the dictum in *McKart* and hold that an improper classification is not a defense to a prosecution for failure to report for a physical examination. We note that even if Atkins were allowed to interpose the impropriety of his classification as a defense to this prosecution, he would still have to show that there was *no basis in fact* for his classification, *Estep v. United States*, 1946, 327 U.S. 114, 66 S.Ct. 423, 90 L.Ed. 567; *United States v. Turcotte*, 5 Cir. 1973, 487 F.2d 417; *Robertson v. United States*, 5 Cir. 1969, 417 F.2d 440 (en banc); *McCoy v. United States*, 5 Cir. 1968, 403 F.2d 896. Both the jury, and the trial court (in considering post verdict motions), found that there was a basis in fact for appellant's classification.

6. In *United States v. Heywood, supra*, the Court made it clear that its opinion in *United States v. Hayden*, 9 Cir. 1971, 445 F.2d 1365 had recognized the general rule that improper classification is no defense to a charge of failing to report for a physical, *except* where a registrant is already classified I–O when ordered for a physical and subsequently is improperly classified I–A. That exception exists only because I–O registrants are deemed to have met physical requirements if they do not report for their physicals, and will not be ordered to active duty any way. *Heywood, supra*, 469 F.2d at 605. This exception is not present in the case at bar since the appellant never claimed I–O, conscientious objector status.

Was the Denial of Discovery an Abuse of Discretion?

[3] The appellant complains that he was denied a motion to discover certain statements he made to an FBI agent. Had he known the contents of the statement, appellant argues, he might well have chosen to take the witness stand in his own defense. Appellant continues that because of this denial of discovery he was denied the constitutional guarantee of effective assistance of counsel and that we should presume prejudice *per se*.

[4] Atkins requested discovery of the statements at a pre-trial conference immediately prior to the empaneling of the jury, and the trial court in its discretion denied the motion. Rule 16(f) of the Federal Rules of Criminal Procedure,[7] in effect at the time of trial, provided that a motion must be made within 10 days after arraignment to be considered timely made. The trial judge may deny an untimely motion where the defendant has failed to show cause "why such motion would be in the interest of justice", *United States v. Newman*, 3 Cir. 1973, 476 F.2d 733, 739; *Hellman v. United States*, 5 Cir. 1964, 339 F.2d 36, 39; *United States v. Conder*, 6 Cir. 1970, 423 F.2d 904, 910, *cert. denied*, 1970, 400 U.S. 958, 91 S.Ct. 357, 27 L.Ed.2d 267. The appellant in the instant case made his oral request for discovery approximately two years after arraignment. The government never called the FBI agent to testify, and had informed the appellant that they would advise him ahead of time if they decided to utilize his testimony. Under these circumstances, we can find no abuse of discretion by the trial court.

Was Appellant Denied His Right to a Speedy Trial?

Appellant was indicted on September 18, 1972, was arraigned on June 15, 1973, and was tried on May 15, 1975. Appellant claims that the eight month delay in arraignment and the two and one-half year delay between indictment and trial mandate a reversal.

[5] He argues that the eight month period between indictment and arraignment are in violation of the Plan for the Prompt Disposition of Criminal Cases Within the Southern District of Georgia[8] which requires that arraignment occur "within two (2) weeks after indictment . . . unless circumstances make arraignment impractical". The govern-

7. Rule 16(f) Fed.R.Crim.P. reads as follows:

> (f) Time of Motions. A motion under this rule may be made only within 10 days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

8. Adopted pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure.

ment counters that the eight month delay between indictment and arraignment was occasioned by their decision to postpone arraignment until the conclusion of appellant's civil suit in which the same issues were being litigated. The appellant was arraigned within one month from the decision in his civil action.

Judge Ainsworth recently wrote in considering the "Plan" for the Southern District of Texas, that these plans are "not inflexible and noncompliance therewith does not automatically result in dismissal", *United States v. Maizumi*, 5 Cir. 1976, 526 F.2d 848 [1976]; *see also United States v. Clendening*, 5 Cir. 1976, 526 F.2d 842 [1976]. We stated in *United States v. Rodriguez*, 5 Cir. 1974, 497 F.2d 172, 176 n. 3, that "the question to be resolved is whether, considering the public interest, alongside the defendant's extraplan rights, the delay is one that the purposes and the language of the Plan can tolerate". We note that the Georgia plan in the instant case requires:

> Upon receipt of notification from the Clerk or at the suggestion of any party that a time limit prescribed by, or as extended under, these rules shall have expired, the Court shall take appropriate action to determine the cause of delay and to remedy the same. Failure to comply with time limits set under this plan shall not otherwise affect the rights of the parties.

The appellant never informed the Court that the time limits for arraignment had passed or requested that he be arraigned. We believe that the government's decision not to arraign the appellant until after the resolution of his civil action does no violence to the District Court's plan and does not mandate reversal.

[6] The appellant further contends that the two and one-half year overall delay between indictment and trial requires reversal.

[7] *Barker v. Wingo*, 1972, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101, sets the standard to be applied in post-accusation delay[9] cases. The Court refused to establish a set period of time within which the government must try a defendant, instead establishing a balancing test. The four factors appropriate for consideration are: (1) the length of delay, (2) reason for delay, (3) defendant's assertion of his right to a speedy trial, and (4) prejudice resulting from the delay in bringing the defendant to trial, *Barker v. Wingo, supra*, 407 U.S. at 530, 92 S.Ct. at 2192, 33 L.Ed.2d at 117; *United States v. Duke*, 5 Cir. 1976, 527 F.2d 386, 388 [1976]; *Gravitt v. United States*, 5 Cir. 1975, 523 F.2d 1211, 1216.

The length of delay from the date of the offense until the date of trial is approximately five years. The period from the indictment until trial was approxi-

9. Judge Morgan points out that the terms previously used by courts were pre and post indictment, but the proper terms now are pre and post accusation delay, *United States v. Duke*, 5 Cir. 1976, 527 F.2d 386, 388 n. 1 [1976]. The Supreme Court in *Dillingham v. United States*, 1975, — U.S. —, 96 S.Ct. 303, 46 L.Ed.2d 205 held that the Sixth Amendment is activated whenever the defendant becomes an *accused*, either through arrest or otherwise, regardless of whether an indictment has been returned.

The record in the instant case does not reveal when, if ever, the appellant was arrested. Giving all benefit of doubt to the appellant, we assume the earliest he could claim that he became accused was when his case was reported to the U. S. Attorney on June 5, 1970. Thus, the total delay between accusation and trial would be approximately four years and eleven months.

mately two and one half years. There were various reasons for the delay which are detailed in our statement of the facts *supra*. Basically, the delay between the reporting of appellant's offense to the U. S. Attorney in June, 1970, and his indictment in September, 1972 was the government's desire to await the outcome of litigation pending in the Fifth Circuit which concerned the same issues.[10] The bulk of the post-indictment delay resulted from the staying of the appellant's criminal action pending the resolution of his civil action, continuances and a postponement of action to allow appellant to enlist as an alternative to prosecution or to take advantage of the Presidential Clemency Program. The defendant never asserted his right to a speedy trial until September 26, 1974. Since one of the grounds for his motion to dismiss then was that the President had proclaimed a clemency program, the Court construed the motion as one for a continuance, and the appellant did not object.[11] Appellant was tried soon after the expiration of the clemency program. The appellant's only assertion of prejudice is that the delayed pendency of the prosecution has affected his practice as an attorney and his personal life. When all these factors are weighed and balanced, the appellant's claim that he was denied a speedy trial is obviously lacking. There is no merit to this contention.

The Allen Charge and Prosecutorial Comments

[8] The appellant claims that the giving of what the Judge termed a modified Allen charge was error since the jury had only been deliberating ninety minutes and they seemed more confused than conscientiously deadlocked. The appellant makes no arguments that have not been previously considered and rejected by this Court. The charge given was within the limitations established by our decision in *United States v. Bailey*, 5 Cir. 1972, 468 F.2d 652, *aff'd en banc*, 1973, 480 F.2d 518.

[9] Appellant's final contention is that the prosecutor made prejudicial and

10. See note 4, *supra*.

11. THE COURT: . . . I am telling you to state that you are either going to take advantage of it [the clemency program], you are not going to take advantage of it, or you don't know whether you are going to take advantage—he may know now, you see.
MR. RUFFIN: We stand on our previous position, Your Honor, which we have . . .
THE COURT: Well, what is it? Just state it. You don't know.
MR. RUFFIN: We have taken no position with regard to that.
THE COURT: In other words, you don't know whether he is going to take advantage of this or not?
MR. RUFFIN: That is correct, sir.
THE COURT: All right. In view of that, I am going to construe this to be a motion for a continuance, and if you object to it from that standpoint, I want you to state your objections into the record.
MR. RUFFIN: I don't think that I have any standing to object to it, Your Honor.
THE COURT: All right. I am going to construe this motion as a motion to continue until such time as he elects to come under the provision for—until January 31, 1975, has expired.
. . . . . .
MR. RUFFIN: Well, what I am indicating, Your Honor, in light of the fact that you have taken the motion as a motion for a continuance, we do not wish it to be construed by the Court that we are waiving any Constitutional rights.
THE COURT: No. I understand.
Appellant's Appendix, pp. 34–35.

inflammatory remarks which had a cumulative effect that was invidious, improper and unfair. We have reviewed these allegedly improper remarks and find nothing approaching the requirements for a reversal.

The Judgment of the District Court is Affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF GEORGIA

AUGUSTA DIVISION

UNITED STATES OF AMERICA	I	
	I	
v.	I	CRIMINAL NO. 5524
	I	
H. SAMUEL ATKINS, JR.	I	

O R D E R

Defendant having moved the Court for a judgment of acquittal pursuant to F.R. Cr. P. 29,

NOW, upon consideration thereof, the motion in all respects is denied.

IT IS SO ORDERED at Augusta, Georgia, this 16th day of May, 1975.

/s/ Alexander A. Lawrence

CHIEF JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF GEORGIA

FILED IN OFFICE

Honorable B. C. Baxter, Jr.
Assistant United States Attorney
P. O. Box 2017
Augusta, Georgia 30903

JUN 19 1975

OFFICE OF THE DIRECTOR

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
1724 F STREET NW.
WASHINGTON, D.C. 20435

ADDRESS REPLY TO
THE DIRECTOR OF SELECTIVE SERVICE

6.100

-12a-

March 5, 1970

LETTER TO ALL STATE DIRECTORS

SUBJECT: Armed Forces Examinations

This letter supersedes all Notices of Examination Call on State SSS Form 199.

It has now been established that the drawing applicable to registrants born in 1951 will be held soon enough (probably early in July) to permit their physical examinations in random sequence in adequate numbers to meet early 1971 calls for induction. Assurance has also been received that calls for induction this calendar year will be considerably less than last year. With this understanding, the need at this time to examine registrants with the larger sequence numbers and those born in 1951 now seems to be reduced if not eliminated.

At the expressed desire of the Department of Defense, the Selective Service System is requested, as soon as possible, to undertake every effort in the program of physical examinations to expedite strict conformance with low random selection sequence.

Effective with the issuance of additional orders for physical examination, registrants forwarded should be confined to:

1. All Class 1-A, 1-A-O, and 1-O registrants with random numbers 1 through 215.

2. All deferred or exempted registrants in all classifications who are likely to be removed from their current deferred or exempted status in the next six months, with random numbers 1 through 215.

Registrants with random sequence numbers 216 through 366 and registrants born in 1951 will not be forwarded for preinduction physical examination until further notice.

This does not apply to volunteers for induction or to registrants who have in writing requested AFEES physical examinations, both of whom should be accommodated as quickly as facilities permit in accordance with the agreement and understanding arrived at during the last State Directors Conference.

-13a-

Any efforts by AFEES commanders to increase the input of selective service registrants contrary to these specifications should be ignored. They are being fully informed of this understanding through their official channels.

ACTING DIRECTOR